THIRUMALAI & ANOR. v. PUBLIC PROSECUTOR

[A. Cr. J. (Thomson C.J.) October 14, 1960]

[K. L. — Selangor Criminal Appeal No. 57 of 1960]

Penal Code, s.385 — Extortion — Question of Discrepancies in Evidence.

The appellants were convicted and sentenced to nine months' imprisonment in the Sessions Court for putting a person in fear of injury in order to commit extortion in contravention of section 385 of the Penal Code. They appealed against the conviction and sentence contending that the learned President paid insufficient attention to certain considerations relating to the Police report and that the report should have discredited the evidence of the complainant because of certain discrepancies and also because evidence was admitted of events which happened after the date of this report.

Held: (1) there were no discrepancies between the report and the subsequent evidence of the person who made it and as such there was no material on which his evidence could be said to be discredited;

(2) there is no authority that excludes evidence of events which occurred after the making of the report if it is relevant and admissible.

CRIMINAL APPEAL.

Dato R. P. S. Rajasooria for the appellants.

Syed Hamzah bin Tahir (Deputy Public Prosecutor) for the respondent.

Thomson C.J. (delivering oral judgment): These two appellants were convicted in the Sessions Court at Kuala Lumpur for putting a person in fear of injury in order to commit extortion in contravention of section 385 of the Penal Code and sentenced to nine months' imprisonment. Against these convictions and sentences they have now appealed.

There was a great deal of evidence particularly that of the complainant and his son which if it was believed showed the appellants were guilty. On the other hand both the appellants gave evidence on their own behalf and if they were believed they were not guilty.

The President in a long and careful judgment has analysed the evidence in some detail and has stated that on his consideration of the evidence as a whole he was satisfied that the prosecution witnesses were speaking the truth in so far as their evidence implicated the two appellants and accordingly he convicted.

In so far as the question was one of credibility the President's finding had not been attacked.

It is said, however, that he paid insufficient attention to certain considerations relating to the Police report in connection with the crime which was made on 16th May. It was said in the first place that that report should have discredited the evidence of the complainant by reason of discrepancies and in the second place that evidence was admitted of events which happened after the date of that report.

With regard to the first of these points I can only say that for myself I see no discrepancy between the report and the subsequent evidence of the person who made it. It is true that in his subsequent evidence he gave evidence of facts that he did not mention in his report but on no particular fact did his evidence at the trial differ from what he said in his report. In my opinion therefore there was no material on which his evidence could be said to be discredited.

Again, it is said that evidence was given of the events which occurred after the making of the report. For myself I know of no authority that excludes such evidence if it is otherwise relevant and admissible; and indeed in the practice of the Courts it is admitted almost every day.

The appeal is dismissed.

Appeal dismissed.

TAI KIEN LUING v. TYE POH SUN & ORS.

[O. C. J. (Rigby J.) October 24, 1960]

[Penang — Originating Summons No. 74 of 1959]

Charity — Impossibility of performance — General charitable intention — Cy-pres — Resulting trust.

The settlor in this case established a charitable trust upon the terms and for the express purposes contained in the trust deed. The first part of the trust provided for a named school and hospital in Penang. The second part provided for named Schools and hospitals in specified places in China, and the deed further provided that "in the event of there being any other new Schools or Hospitals in the aforesaid places in China being subsequently opened the Head Trustee shall have full discretion and authority to include the same amongst the above". The question arose as to whether the second part of the trust was void for impossibility of performance, and if it was, whether there was a general charitable intention on the part of the settlor to devote this part of the property for charitable purposes generally.

Held: (1) the mere fact that the government of this country does not recognise the government of Communist China could not make the trust void for impossibility of performance. The sole question is on the practicability or otherwise of administering the trust fund. In the light of the evidence before the Court it could not be said that the trust was void for impossibility;

(2) there was a good charitable trust. Whether it might subsequently lapse by reason of impossibility of performance depended entirely on whether or not the Controller of Foreign Exchange would be prepared to sanction the application made by the trustees of the deed to remit moneys arising out of the trust fund to the specified institutions in China;

(3) in the event of the trust lapsing by reason of impossibility of performance, the terms of the trust could not be construed in favour of a general charitable intention, but there would be a resulting trust in favour of the residuary legatees of the settlor's estate.

Cases referred to:—

(1) *In re Robinson* (1931) 100, L.J., Ch. 321.
(2) *Re Vagliano* (1905) 75, L.J., Ch. 119.
(3) *Clark* v. *Taylor* 1, Drew, 644.
(4) *In re Ovey* (1885) L.R., 29, Ch. D. 560 at p. 564.
(5) *In re Watson* [1913] 1 Ch. 314.
(6) *Re Welsh Hospital* [1921] 1 Ch. 655.

ORIGINATING SUMMONS.

Ong Huck Lim for the plaintiff (applicant).

G. H. Conaghan and *Chew Choon Poon* for 1st, 2nd and 3rd defendants.

Eusoffe Abdoolcader and *L. E. Osman* for the 4th defendant.

L. A. Massie (Senior Federal Counsel) for the Attorney-General.

Lim Cheng Ean for Tye Yee Fun, representing next of kin of settlor.

Rigby J.: By an Indenture dated the 8th May, 1912, one Tye Kee Yoon conveyed a substantial part of his real estate to six of his close relatives upon trust to establish a charitable trust to be known as "The Tye Kee Yoon Charity" upon the terms and for the express purposes contained in that trust deed. Under the terms of the trust, out of the income arising from the trust the head trustee, after retaining 5% of the gross receipts as remuneration for the trustees, and subject to a discretion to maintain a reserve fund to meet extraordinary outlay for repairs, rebuilding, rates, taxes and assessments, was directed at the end of each Chinese year to pay the balance to the following institutions, that is to say:—

"One-tenth thereof to Lam Hua Ee Hospital in Penang, One-tenth thereof to Si Teong Hek Toong School in Penang, and the balance of such monies shall be divided in the discretion of the said Head Trustee and in such proportions as he may think proper amongst the following Hospitals and Schools in China, viz:—

Sam Hoe Ee Kwan Hospital and Sam Hoe Hak Toong School at Sam Ho Pa in China.

Joon Sin Hak Toong School, Leong Tean Sio Hak Toong School Taipu, Ee Khiok Hospital and Moh Hak Teong School at Taipu in China, and Swatow Ee Kwan Hospital in Swatow in China".

The trust deed further provided that:—

"In the event of there being any other new Schools or Hospitals in the aforesaid places in China being subsequently opened the Head Trustee shall have full discretion and authority to include the same amongst the above".

Under the terms of the Trust the Head Trustee was required to pay:—

"The said monies to the Treasurer, the Trustee or head man (Kehtio) for the time being of the said Institutions, and his receipt shall be a sufficient discharge to him".

By an earlier will dated the 30th January, 1912, the settlor had appointed his four sons and his adopted son as his executors and, subject to various bequests and legacies, had directed them to make a distribution of the property on the expiration of twenty-one years after the death of the longest liver of his named existing grandchildren. In the meantime the moneys arising from the estate was to be expended in accordance with the terms and provisions of the will. It is to be observed that 20% of that income was to be expended in Chew Shin Cha Yeung in China in specified proportions on education, hospitals, roads, ferries and bridges and alms giving.

The deceased died in 1919 and probate of his Will was duly granted.

The question now before me for determination is as to the true construction of the trust deed of 1912 and as to whether that part of the trust providing for a distribution of 8/10ths of the surplus of the income to the specified schools and hospitals in China is void for impossibility of performance. If it is void for impossibility of performance then the question arises as to whether it can properly be inferred that there was a general intention on the part of the settlor to devote this part of his property for charitable purposes generally and whether this Court, in order to give effect to that professed intention, should order that the income be diverted from the Chinese trust to the benefit of the named school and hospital in Penang or to other Federation charities in accordance with a scheme to be settled *cy-pres*, or whether there is a complete failure of the Chinese trust and accordingly a resulting trust in favour of the estate of the deceased. If there is a resulting trust then the subsidiary question arises as to whether it is in favour of the residuary legatees or the next of kin.

The main ground put forward for holding that the trust was void for impossibility of performance was that this country did not recognise the Government of Communist China, and since there was no diplomatic means of communication between the two Governments there was no power whereby the trustees or the Courts of this country could ensure that the trust was being properly carried out. In the light of the evidence given before me, I was not impressed by that argument. It is not suggested that the trust, as it exists, is for an unlawful purpose. Nor, indeed, was it ever contended before me (and this is, perhaps, a matter for some surprise) that the trust was void as being contrary to public policy. The fact that the Government of this country does not recognise the Government of the so-called Peoples' Republic of China is, in itself, irrelevant; the sole question is as to the practicability or otherwise of administering the trust fund. The fact that the object of the trust has to be performed outside the jurisdiction is not a ground, in itself, for declaring the trust to be invalid (see the case of *In re Robinson*[1]): nor is the further fact that the trustees of what is to all intents and purposes a foreign charity are themselves resident within the jurisdiction of this Court (see the case of *Re Vagliano*[2]).

Since I was of the opinion that it was impossible for me to decide whether or not the terms of the trust could be carried out until I had heard evidence as to what remittances, if any, from this country were permissible to Communist China, I adjourned the matter for such evidence to be produced. Thereafter, an affidavit was duly filed by the Assistant Controller of Foreign Exchange, and at a subsequent hearing before me he was cross-examined on that affidavit. The effect of his evidence is that the present policy of the Government is to allow personal or family remittances from persons resident in the Federation of Malaya to persons resident in China to the maximum amount of $45 per month from any one family in Malaya for the benefit of a member or dependant of that family in China. With regard to remittances to

institutions established in China, there is no settled policy and each application is considered by the Controller of Foreign Exchange on its merits. In cross-examination the deponent said that to the best of his knowledge no application had, in fact, yet been made to the Controller of Foreign Exchange for permission to remit moneys to any institution established in China, nor had any specific application been made at any time on behalf of the Tye Kee Yoon Trust to remit money to any institution. He admitted that he had been consulted early this year on behalf of the Tye Kee Yoon Trust on the general question of sending remittances to institutions in China, but he had said that he would have to refer the matter to his head office in Kuala Lumpur. He re-affirmed that there was no fixed scale controlling remittances to institutions in China — assuming such remittances were allowed at all — and each application would have to be considered on its merits.

In the light of that evidence it seems to me impossible for this Court at this stage to hold that this trust is void for impossibility of performance or that it has lapsed because the trust cannot be carried out. On the face of it, it is a perfectly valid charitable trust. Whether or not it is capable of performance depends entirely upon whether or not the Controller of Foreign Exchange will sanction remittances to all or any of the institutions specified by the settlor in the trust deed or by the head trustee, in the exercise of his discretion.

I was informed that the trust fund now consists of 99 houses producing an average total net income of about $1,000 a month of which 8/10ths is available for distribution to the Chinese trust, subject to the discretion of the trustees to create a reserve fund. There is at present about $20,000 in the reserve fund. There was some evidence before me that from 1955 to 1959, the trustees had been remitting monthly sum of $45 per month to two or three schools in the Taipu District of China and receipts purporting to be issued by the headmasters of these schools were produced in evidence. If it were necessary for me to do so, I would unhesitatingly take the view that such remittances did not constitute a valid execution of the provisions of the trust but amounted to no more than a thinly veiled pretence on the part of the trustees to convey the outward and erroneous impression that they were carrying out the terms of the trust. Even allowing for the discretion of the head trustee to create a reserve fund, the monthly personal remittances made to the headmasters amounted to less than 20% of the monthly income of the trust fund. I have no doubt that the remittances were made as personal remittances for the maximum amount because of the difficulties which the trustees clearly anticipated in obtaining permission from the Controller of Foreign Exchange to send larger sums, in accordance with the provisions of the trust and in proportion to the monthly income available, to the institutions stated in the trust deed.

I am, however, of the opinion that I must hold that, *prima facie*, the deed of settlement constitutes a valid charitable trust. Whether it may subsequently lapse by reason of being incapable of performance must depend entirely upon whether or not the Controller of Foreign Exchange is prepared to sanction the application made by the trustees to remit moneys arising out of the fund to the institutions mentioned in the trust deed in accordance with the intention of the settlor or the discretion of the head trustee.

That really disposes of this application. But in view of the position which must necessarily arise if the trust is subsequently found to be incapable of performance, it is desirable for me to consider the further arguments raised.

Mr. Massie, for the Attorney-General, contended that the trust was void for impossibility of performance. He submitted that there was a general charitable intention to be inferred from the terms of the trust, and if it was impossible to carry out the trust in relation to the schools in China, the general charitable intention should not fail altogether but the trust fund should be diverted either to the named school and hospital mentioned in the earlier part of the trust or to other Federation charities in accordance with a scheme to be drawn up with the approval of the Court and administered by the Attorney-General. I do not accept that argument. It seems to me quite clear that no general charitable intention is to be inferred from the terms of the trust. The first part of the trust provides for a named school and hospital in Penang. The second part provides for schools and hospitals in China. It is an express trust limited to schools and hospitals in specified places in China. There is no intention to benefit schools and hospitals generally irrespective as to where they might be. It was an intention to benefit such institutions in the particular districts in China expressly stated by the settlor. If, indeed, it were possible to infer a general charitable intention from the words used by the settlor, then, in my view, the intention was for the moneys to be used for general charitable purposes in China. The principle applicable in cases where a charitable intention to benefit a particular charity fails by reason of impossibility of performance is well set out in the case of *Clark* v. *Taylor*,[3] where Vice-Chancellor Kindersley stated:—

> "Now there is a distinction well settled by the authorities. There is one class of cases, in which there is a gift to charity generally, indicative of a general charitable purpose, and pointing out the mode of carrying it into effect; if that mode fails, the Court says the general purpose of charity shall be carried out. There is another class, in which the testator shews an intention, not of general charity, but to give to some particular institution; and then if it fails . . . . . , the gift does not go to charity generally: that distinction is clearly recognised; and it cannot be said that wherever a gift for any charitable purpose fails, it is nevertheless to go to charity".

That passage was cited with approval by Pearson J. in *In re Ovey*.[4] See also the cases of *In re Watson*,[5] and *Re Welsh Hospital*.[6]

I am, therefore, clearly of the opinion that in the event of the trust lapsing for impossibility of

performance, no general charitable intention can be inferred from the terms of the trust. If the trust lapses by reason of its becoming incapable of performance there is a resulting trust in favour of the settlor or, as in this case, in favour of his estate.

The only remaining question for consideration is whether the lapsed devise or trust goes to the residuary legatees or to the next of kin. Mr. Ong Huck Lim contended that it went to the residuary legatees, whereas Mr. Lim Cheng Ean argued that it went to the next of kin. I have always understood the law to be that a lapsed devise falls into residue, whereas a lapsed share of the residue goes to the next of kin as upon a partial intestacy. (See *Jarman on Wills*, 8th edition, Volume I, pages 468-9 and Volume II page 1030). I am therefore, of the opinion that in the event of the charitable trust lapsing by reason of impossibility of performance there would be a resulting trust in favour of the residuary legatees under the Will of the deceased.

To recapitulate, I accordingly hold:—

(i) That the deed of trust dated 8th May, 1912, at the present time constitutes a valid existing charitable trust; and

(ii) That in the event of the trust lapsing by reason of impossibility of performance, the terms of the trust cannot be construed in favour of a general charitable trust capable of being administered *cy-prés*, but that there is a resulting trust in favour of the residuary legatees of the settlor's estate.

Order accordingly.

Solicitors: *Ong Huck Lim & Co.; Chew Choon Poon; Presgrave & Matthews; Lim Cheng Ean.*

In re G. H. CONAGHAN

[O. C. J. (Thomson C.J., Hill J.A. and Ong J.) October 24, 1960]

[K. L. — Originating Motion No. 6 of 1960]

Advocates and Solicitors — Professional misconduct — High standards of conduct to be observed by the legal profession — Public interest.

The respondent, in his capacity as a solicitor, received $14,000 from a third party for payment to a client. The sum received was not paid to the client but was knowingly applied by the respondent to other purposes.

Held: what the respondent had done amounted to professional misconduct of the most serious character.

Per curiam: The legal profession occupies by law a privileged position. The continued existence of that position can only be justified if every individual member of the profession conforms to certain standards.

ORIGINATING MOTION.

Ong Huck Lim for the Disciplinary Committee.

C. O. Lim for the respondent.

Thomson C.J. (delivering oral judgment of the Court): The facts of this unfortunate case are not in controversy and unfortunately are only too clear.

We are in no way concerned with the domestic arrangements of the firm of Conaghan, Wreford & Thornton for it is abundantly clear that the conduct of the business of that firm in Penang was under the sole control of the present respondent.

He, in his capacity as a solicitor and having control of the firm, received $14,000 from a third party for payment to a client for whom the firm was acting. It is equally clear that that money was not, and to this day has not been, paid to the client for whom it was received but has been knowingly applied to other purposes.

That may or may not amount to fraud. It may or may not amount to dishonesty. It may or may not be capable of being described by the euphemism of "miscalculation" which has been used, but it certainly does amount to professional misconduct of the most serious character.

We have listened to a plea for leniency. I need hardly say we have given such weight as we possibly can to that plea. Nevertheless the fact remains that in all these cases there are three interests to be concerned. There is the interest of the solicitor; there is the interest of the legal profession as a whole; and there is the interest of the public. The legal profession occupies by law a privileged position. The continued existence of that position can only be justified if every individual member of the profession conforms to certain standards.

The present respondent has fallen far short of these standards. In consequence he has done harm not only to himself but also to his client and to his profession as a whole and to the public for in the modern world it is in the public interest that there should be a legal profession observing the highest possible standards of conduct.

In the circumstances we feel we have no option but to order the respondent to be struck off. There will be an order that he pays the costs of these proceedings which we assess at $500.

Order accordingly.

Solicitors: *Pillai, Lim, Lee & Hwang; Lim, Lim & Oon.*

TEOH AH POW v. PUBLIC PROSECUTOR

[A. Cr. J. (Rigby J.) November 1, 1960]

[Penang — Criminal Appeal No. 35 of 1960]

Gaming — Common Gaming Houses Ordinance, 1953, ss.7 and 16 — Forfeiture — Gaming House — Public place.

The appellant was convicted together with another person of being found gaming in a public place contrary to section 7 of the Common Gaming Houses Ordinance 1953. In his defence the appellant said that he had gone to the house to look for a friend and that he had taken no actual part in gaming. The learned Magistrate disbelieved the accused and convicted him, fining him $50. The learned Magistrate purporting to act under section 16(2) of the Common Gaming Houses Ordinance ordered that the loose money found in the appelllant's pocket be